DATE: February 14, 1994
CASE NO. 84-ERA-13

IN THE MATTER OF

JOSEPH D. WAMPLER,

COMPLAINANT,

v.

PULLMAN-HIGGINS COMPANY,

RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

FINAL ORDER DISAPPROVING SETTLEMENT
AND REMANDING CASE

Before me for review is the Order of the Administrative Law Judge (ALJ) issued on March 26, 1984, in this case arising under the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 (1988). The ALJ's Order granted Complainant's motion for withdrawal and dismissed the complaint with prejudice pursuant to 29 C.F.R. § 24.5(e)(4). By letter dated April 12, 1990, Complainant requested that I vacate the Administrative Law Judge's Order and reopen the hearing on his complaint. Complainant contended that the withdrawal of his complaint was based on a settlement agreement which should be declared null and void because of an unenforceable provision restricting Complainant's communication with the Nuclear Regulatory Commission (NRC). Accordingly, Complainant sought to have this case reopened.

On January 23, 1992, I issued an Order to Submit Settlement Agreement, directing the parties to submit a copy of any executed settlement agreement and to set forth the extent to which they had performed their obligations under this agreement. Finding

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that the case remained open for a final decision by the Secretary, I denied the request to reopen the record. *See* Order to Submit Settlement Agreement, slip op. at 2, fn. 2. Additionally, the parties were invited to submit their views on

the severability of any provision which prevented Complainant from communicating any of his safety concerns to the NRC.

In response to my January 23 Order, each party filed a brief before me and submitted a copy of the fully executed settlement agreement and general release dated March 20, 1984. *See* Attachments E, G to Pullman-Higgins' Response to Order to Submit Settlement Agreement (Respondent's Response); Exhibit 1 to Complainant's Response to Order of the Secretary of Labor (Complainant's Response).

Section 210(b)(2)(A) of the ERA, 42 U.S.C. § 5851(b)(2)(A), provides that "the Secretary shall, unless the proceeding on the complaint is terminated by the Secretary on the basis of a settlement entered into by the Secretary and the person alleged to have committed such violation, issue an order either providing the relief prescribed by subparagraph (B) or denying the complaint." The Secretary's role is to review the terms of settlement agreed upon by the private parties to ensure that the settlement is fair, adequate and reasonable. *See* 42 U.S.C. § 5851(b)(2)(A); 29 C.F.R. § 24.6(a) (1991); *Macktal v. Secretary of Labor*, 923 F.2d 1150, 1153-54 (5th Cir. 1991); *Thompson v. United States Department of Labor*, 885 F.2d 551, 556 (9th Cir. 1989). In the interest of administrative economy, I will review the settlement agreement in light of the record in this case, including the parties' responses on severability, rather than remand the case to the ALJ for initial review of the settlement agreement. *See Hamka v. The Detroit Edison Company*, Case No. 88-ERA-26, Sec. Order to Submit Settlement, Feb. 15, 1990, slip op. at 4.

Review of the settlement agreement and general release reveals that the agreement may encompass the settlement of claims arising under various laws only one of which is the ERA. For the reasons set forth in *Poulos v. Ambassador Fuel Oil Co., Inc.*, Case No. 86-CAA-1, Sec. Order, Nov. 2, 1987, slip op at 2, I have limited my review of the agreement to determining whether its terms are a fair, adequate and reasonable settlement of Complainant's allegation that Respondent violated the ERA.

With respect to the parties' agreement to keep the terms of the settlement agreement confidential, I note that the parties' submissions become a part of the record in this case, and that the Freedom of Information Act, 5 U.S.C. § 552 (1988), requires federal agencies to disclose requested records unless they are exempt from disclosure under the Act. *See Plumlee v. Alyeska Pipeline Service Company*, Case Nos. 92-TSC-7, 10, Sec. Fin. Order

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Approving Settlements and Dismissing Cases with Prejudice, Aug. 6, 1993, slip op. at 5-6; *McTiernan v. Public Service Co. of Colorado, Inc.*, Case No. 91-ERA-37, Sec. Order Approving Settlement, Feb. 21, 1992, slip op. at 1-2.

The challenged provision of the settlement agreement provides, "Neither party will discuss or disclose the facts of this case except if ordered to do so by court, tribunal or agency of competent jurisdiction." Para. # 2. Complainant argues before me that this provision violates the very right which the ERA is intended to protect, to freely express health and safety

concerns to the NRC, and that therefore, the entire agreement should be declared null and void as contrary to public policy, and as a deterrent to keep such clauses out of future agreements. To the extent that this provision could be construed as restricting Complainant from voluntarily communicating and providing information to any federal or state government agencies, it is void as contrary to public policy and unenforceable. [1] *See Polizzi v. Gibbs & Hill, Inc.*, Case No. 87-ERA-38, Sec. Order, July 18, 1989, slip op. at 3-6.

In its brief before me, Respondent requested that the challenged provision be stricken from the settlement agreement to the extent that it may be construed as limiting Complainant's ability to provide information to government agencies, but urges that the remainder of the agreement should be upheld. Although Respondent, the party in whose favor the invalid provisions would run, has specifically agreed to severance of the provision as unenforceable, *See* Respondent's Response at 13-14, Complainant has not consented to such a modification of the agreement. Section 5851(b)(2)(B) of the ERA specifically states, "The Secretary may not enter into a settlement terminating a proceeding on a complaint without the participation and consent of the complainant."

In the situation presented here, I feel constrained to follow the Court's decision in *Macktal* holding that the Secretary must consent or not consent to the terms of a proposed settlement as written, and cannot sever a term and enforce the remainder of the agreement under the language of the ERA, without the consent of both parties. *Macktal*, 923 F.2d at 1155. Such action was found to be a prohibited modification of a material term of a negotiated settlement without the consent of the parties. [2] Accordingly, I must reject the settlement agreement before me and remand the case to the ALJ. *See Macktal v. Brown & Root, Inc.*, Case No. 86-ERA-23, Sec. Order Disapproving Settlement and Remanding Case, Oct. 13, 1993, slip op. at 2-7.

Accordingly, the settlement agreement is rejected and the case is remanded for further appropriate action consistent with this opinion and the ERA.

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SO ORDERED.

ROBERT B. REICH
Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1] The Secretary represents the public interest in keeping channels of information open by assuring that settlements adequately protect whistleblowers.

[2] I further note however, that the Court upheld the Secretary's position that Complainant's initial consent to a settlement agreement cannot be withdrawn before the Secretary has reviewed the settlement. *Macktal* at 1156-1157.